STATE OF MICHIGAN

IN THE SUPREME COURT

An Appeal from the Court of Appeals
Saad, P.J., and Cavanagh and Cameron, JJ.

DWAYNE WIGFALL,

Plaintiff-Appellant

v.

CITY OF DETROIT,

Defendant-Appellee.
_____/

Supreme Court Docket No. _____

COA Docket No. 333448
Lower Court Case No: 15-015620-NO

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PLAINTIFF-APPELLANT, DWAYNE WIGFALL'S, APPLICATION FOR LEAVE TO APPEAL

Dated: November 21, 2017

TABLE OF CONTENTS

Index of Authorities iii

Basis of Appellate Jurisdiction vi

Statement of Questions Presented vii

Grounds for Review 1

Introduction 2

Concise Statement of Facts and Material Proceedings 3

Factual Background 3

Procedural History 6

Standard of Review 9

Law and Argument 10

I. THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR VACATING THE TRIAL COURT'S DENIAL OF DEFENDANT-APPELLEE'S MOTION FOR SUMMARY DISPOSITION BECAUSE PLAINTIFF-APPELLANT'S NOTICE WAS LAWFULLY SERVED ON THE "CITY OF DETROIT—CLAIMS" AS DIRECTED BY DEFENDANT-APPELLEE'S CORPORATION COUNSEL 10

A. General Law Regarding Statutory Interpretation 10

B. Mr. Wigfall Served the City Notice of Injury and Defect in Compliance with MCL 691.1404 Given the Facts and Law Applicable to this Case 10

II. THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR VACATING THE TRIAL COURT'S DENIAL OF DEFENDANT-APPELLEE'S MOTION FOR SUMMARY DISPOSITION BECAUSE DEFENDANT-APPELLEE SHOULD BE EQUITABLY ESTOPPED FROM ASSERTING IMPROPER SERVICE GIVEN ITS EXPRESS REPRESENTATIONS IN THIS CASE 19

Relief Requested 22

Certificate of Service 23

INDEX OF AUTHORITIES

Cases:	**Page(s)**
Borman v State Farm Fire and Casualty Company, 198 Mich App 675; 499 NW2d 419, aff'd 446 Mich 482; 521 NW2d 266 (1994)	9
Burise v City of Pontiac, 282 Mich App 646; 766 NW2d 311 (2009)	11
Bush v Shabahang, 484 Mich 156; 772 NW2d 272 (2009)	10
Devine v Al's Lounge, Inc, 181 Mich App 117; 448 NW2d 725 (1989)	9
Dobbelaere v Auto-Owners Ins Co, 275 Mich App 527; 740 NW2d 503 (2007)	9
Downriver Plaza Grp v Southgate, 444 Mich 656; 513 NW2d 807 (1994)	13
Farmers Ins Exch v AAA of Michigan, 256 Mich App 691; 671 NW2d 89 (2003)	9
Green v Detroit, 87 Mich App 313; 274 NW2d 51 (1978)	14, 20
Hughes v Almena Twp, 284 Mich App 50; 771 NW2d 453 (2009)	19,21
Hussey v Muskegon Hts, 36 Mich App 264; 193 NW2d 421 (1971)	12
Institute in Basic Life Principles, Inc v Watersmeet Twp. (After Remand), 217 Mich App 7; 551 NW2d 199 (1996)	10
Jones v Ypsilanti, 26 Mich App 574; 182 NW2d 795 (1970)	12
Lash v City of Traverse City, 479 Mich 180; 735 NW2d 628 (2007)	10
McCahan v Brennan, 492 Mich. 730; 822 NW2d 747 (2012)	13-14
McLean v Dearborn, 302 Mich App 68; 836 NW2d 916 (2013)	17-18
Meredith v City of Melvindale, 381 Mich 572; 165 NW2d 7 (1969)	12
Parker-Cherry v NYC Housing Auth., 878 NYS. 2d 790 (App. Div. 2d Dep't. 2009)	14

Pittsfield Twp v Malcolm, 375 Mich 135; 134 NW2d 166 (1965) 19

Plunkett v Dep't of Transp, 286 Mich App 168; 779 NW2d 263 (2009) 2,12,15

Rose Hill Ctr, Inc v Holly Twp, 224 Mich App 28; 568 NW2d 332 (1997) 10

Rowland v Washtenaw Co Rd Comm., 477 Mich 197; 731 NW2d 41 (2007) 11-15
18

Rule v Bay City, 12 Mich App 503; 163 NW2d 254 (1968) 14

Smith v City of Warren, 11 Mich App 449; 161 NW2d 412 (1968) 12,13

State Treasurer v Sheko, 218 Mich App 185; 553 NW2d 654 (1996) 19

Thurman v City of Pontiac, 295 Mich App 381; 819 NW2d 90 (2012) 14

Truel v City of Dearborn, 291 Mich App 125; 804 NW2d 744 (2010) 10

Withers v Detroit, No. 324009, 2016 WL 683125 (Mich Ct App Feb 28, 2016) 18

Yaldo v North Pointe Ins Co, 457 Mich 341; 578 NW2d 274 (1998) 10

Statutes:

MCL 691.1401 *et seq.*, 10

MCL 691.1402(1) 6

MCL 691.1404(1) *passim*

MCL 691.1404(2) *passim*

Court Rules:

MCR 2.105(G)(2) 1,2,16

MCR 2.107(C)(1) 1,2,16

MCR 2.116(C)(7) vi

MCR 7.202(6)(v) vi

MCR 7.303(B)(1) vi

MCR 7.305(B)(3) 1

MCR 7.305(B)(5)(a) 2

MCR 7.305(C)(2) vi

Other Authority:

10 Am. Jur. Proof of Facts 2d 221 19,20

City of Detroit Municipal Code , Sec 7.5-206 4-5

http://www.detroitmi.gov/How-Do-I/File/Law-Claims-Information 5

http://www.detroitmi.gov/Portals/0/docs/Law/LawDepartmentClaimForm.pdf?ver=2015-12-23-140122-220 5

McKinney's General Municipal Law § 50–e 14

BASIS OF JURISDICTION OF THE SUPREME COURT AND STATEMENT REGARDING ORDERS APPEALED FROM AND THE RELIEF SOUGHT

This is an Application for Leave to Appeal from the October 10, 2017 Opinion of the Michigan Court of Appeals, which reversed the trial court's Order Denying Defendant City of Detroit's Motion for Summary Disposition Under MCR 2.116(C)(7) On Grounds of Governmental Immunity. (6/8/16 Order, ***Exhibit 1***).[1] Plaintiff-Appellant, Dwayne Wigfall, brings this Application pursuant to MCR 7.305 and has filed the Application on November 21, 2017. *See,* MCR 7.305(C)(2). Jurisdiction of this Court is based upon MCR 7.303(B)(1) ("review by appeal a case…after decision by the Court of Appeals").

Based on the arguments set forth below, Mr. Wigfall requests that this Honorable Court grant his Application for Leave to Appeal and submits that Court of Appeals' Opinion should be reversed and the matter remanded to the trial court for further proceedings consistent with its original denial of Defendant-Appellee, City of Detroit's ("City"), Motion for Summary Disposition.

[1] This matter was originally assigned to the Honorable Daphne Means Curtis, who recused herself. The matter was then reassigned to Judge Hathaway.

STATEMENT OF QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS COMMIT REVERSIBLE ERROR VACATING THE TRIAL COURT'S DENIAL OF DEFENDANT-APPELLEE'S MOTION FOR SUMMARY DISPOSITION BECAUSE PLAINTIFF-APPELLANT'S NOTICE WAS LAWFULLY SERVED ON THE "CITY OF DETROIT—CLAIMS" AS DIRECTED BY DEFENDANT-APPELLEE'S CORPORATION COUNSEL?

The Plaintiff-Appellant, Dwayne Wigfall, answers, "**Yes**."

The Defendant-Appellee, the City of Detroit, answers, "**No**."

The Court of Appeals answers, "**No**."

II. DID THE COURT OF APPEALS COMMIT REVERSIBLE ERROR VACATING THE TRIAL COURT'S DENIAL OF DEFENDANT-APPELLEE'S MOTION FOR SUMMARY DISPOSITION BECAUSE DEFENDANT-APPELLEE SHOULD BE EQUITABLY ESTOPPED FROM ASSERTING IMPROPER SERVICE GIVEN ITS EXPRESS REPRESENTATIONS IN THIS CASE?

The Plaintiff-Appellant, Dwayne Wigfall, answers, "**Yes**."

The Defendant-Appellee, the City of Detroit, answers, "**No**."

The Court of Appeals answers, "**No**."

GROUNDS FOR REVIEW

Interpretation of MCL 691.1404(2) and instruction regarding provision of notice to a governmental entity are issues of continuing interest and involve legal principles of major significance to the state's jurisprudence. See MCR 7.305(B)(3). It is particularly needed in this case where the City directs that notice be sent to:

Claim Form

(Notice of Claim Must Be Filed Not Later Than 45 Days from the Date of Accident)

City of Detroit Law Department
Claims Section
2 Woodward, Suite 500
Detroit, MI 48226

_____
(Today's Date)

_____
(Print Name)

Gentlemen:

Claim is hereby made against the City of Detroit due to the following happening on

_____ at _____ AM, PM
(Month – Day – Year) (Time)

This Claim Form evidences the City's decision ***not*** to require strict compliance with MCR 2.105(G)(2), as contemplated within MCL 691.1404(2), by identification of a specific individual holding the office of mayor, city clerk, or city attorney. While the City attempts to differentiate between "formal" and "informal" claims, as described by the Court of Appeals in its October 10, 2017 Opinion, there is nothing its document to suggest such a categorized interpretation. In fact, the City's Claim Form tracks in detailed fashion the requirements of MCL 691.1404(1). (See Claim Form, ***Exhibit 7***, *infra*).

Further, contrary to what the City and the Court of Appeals suggest, this is not a circumstance where Mr. Wigfall contends that it had a duty to advise him of the manner in which to provide notice and serve parties as otherwise required by the law and under the Michigan

Court Rules. Rather, this case involves whether the City essentially waived notification as it now argues it is entitled to, i.e., the City's decision ***not*** to require strict compliance with MCR 2.105(G)(2), as contemplated within MCL 691.1404(2), by identification of a specific individual holding the office of mayor, city clerk, or city attorney.

Additionally, the decision in this is case is clearly erroneous and will cause material injustice, compelling review under MCR 7.305(B)(5)(a). As discussed in greater detail below, if the City is allowed to assert improper service of notice, ***after instructing Mr. Wigfall and the public at large on where to send notice***, Mr. Wigfall's negligence claim is time-barred and he has no available remedy to recover for his losses. Review of this case is warranted, and Mr. Wigfall respectfully requests that the Court grant his Application.

INTRODUCTION

The issue in this matter is whether Mr. Wigfall's notice served upon the City's Law Department lawfully complied with MCL 691.1404(2), when the City's designated representative (i.e., Corporation Counsel) gave specific instructions on how to effectuate service of notice, notice was then timely received by "an individual who may lawfully be served", and where there were no statutory deficiencies contained within Mr. Wigfall's notice of injury. What the Legislature and courts have consistently set forth is that the state must have a predictable and reliable method for notifying the proper governmental entity of a claim, and ensuring that the governmental entity can have the reasonable opportunity to investigate and evaluate a claim while it is still fresh, as well as to remedy the defect before other persons are injured. *Plunkett v Dep't of Transp*, 286 Mich App 168, 176–177; 779 NW2d 263 (2009). Service in this case was complete and effective, and the City has been given the opportunity to investigate and evaluate their claim as originally intended by the Legislature. The trial court properly denied its Motion

for Summary Disposition and that determination should be reinstated by this Honorable Court given the facts and circumstances of this case.

CONCISE STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

FACTUAL BACKGROUND

This action arises out of a motorcycle accident that occurred on June 9, 2014. (Traffic Crash Report, ***Exhibit 2***). Specifically, Mr. Wigfall struck a pot hole in the roadway as he was driving north on Algonac Street, near its intersection with East 7 Mile Road in Detroit. *Id.* On September 8, 2014, pursuant to MCL 691.1404, Mr. Wigfall provided notice of the occurrence of his injury and the defect in the roadway, particularly specifying the exact location and nature of the defect, the injury sustained, and the names of witnesses known at the time. (9/8/15 Correspondence, ***Exhibit 3***). The notice was addressed as follows:

> City of Detroit Law Department—CLAIMS
> Coleman A. Young Municipal Center
> 2 Woodward Avenue, Suite 500
> Detroit, MI 48226 [*Id.* at p. 1]

Additionally, it was received by the City of Detroit Claims Section on September 22, 2014. *Id.*

Notably, approximately eight months before Mr. Wigfall's accident occurred, the firm he later retained to represent him in this matter contacted the City of Detroit Law Department, as part of her general job duties, to confirm the proper mailing address for notices of claims against the City. (J.Rashid Affidavit at ¶¶ 3-4, ***Exhibit 4***). On October 28, 2013, Ms. Julie Rashid spoke with Ms. Tyler from the City's Law Department, and requested "the proper contact and address to serve notice of a claim for injuries." *Id.* at ¶4. During that conversation, Ms. Tyler informed her that the correct contact and address were where Mr. Wigfall's notice ultimately was sent:

City of Detroit Law Department— Attention Claims
Coleman A. Young Municipal Center
2 Woodward Avenue, Suite 500
Detroit, MI 48226 [*Id.* at ¶5].

The City has not disputed in this action that Ms. Tyler was previously employed by it and as a member of its Law Department.

Although having official legal counsel, the City's counsel is titled "Corporation Counsel" instead of city attorney. (Detroit Code of Ordinances at Sec. 7.5-201, ***Exhibit 5***). However, this is essentially a distinction without a difference as the Corporation Counsel serves the same functions within Detroit as a city attorney. He heads the City's Law Department and represents the City "as a body corporate". *Id.* The Corporation Counsel is the "duly authorized and official legal counsel for the City of Detroit and its constituent branches, units, and agencies of government." *Id.* Overall, the Corporation Counsel is the "Chief Executive Officer" of the City's Law Department. *Id.* at Sec. 240.

The Corporation Counsel and the City's Law Department share the address where Mr. Wigfall's notice was sent:

City of Detroit Law Department
Coleman A. Young Municipal Center
2 Woodward Avenue, Suite 500
Detroit, MI 48226 [Law Department Location, ***Exhibit 6***].

As the head (i.e., CEO) of the City's Law Department and "official legal counsel for the City…and its constituent branches, units, and agencies of government", the Corporation Counsel prepares or approves forms and documents pertaining to the legal rights and obligations of the City. (Detroit Code of Ordinances at Sec. 7.5-201, ***Exhibit 5***). In fact, Sec 7.5-206 of the City's Code directs:

> Sec. 7.5-206. - Form of Documents.
>
> The Corporation Counsel shall prepare or approve all contracts, bonds and other written instruments in which the city is concerned, shall approve all surety bonds required to be given for the protection of the City, and shall keep a proper registry of all contracts, bonds and instruments.

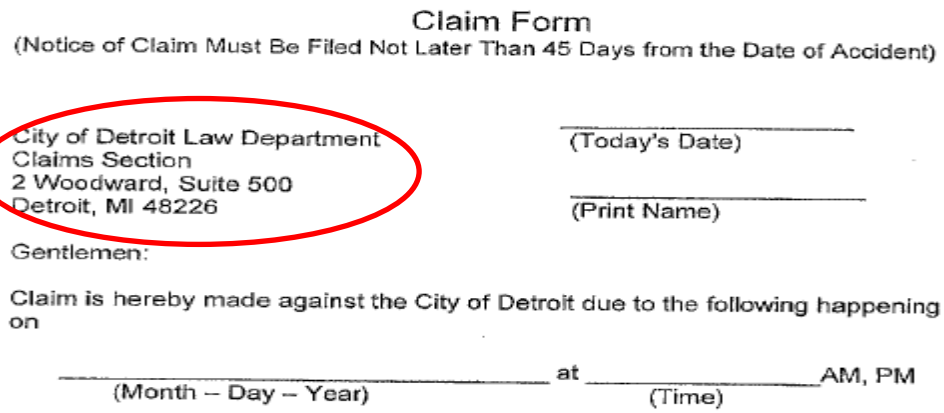
One such "written instrument" that can be found on the official website of the City's Law Department is a multi-page form for filing notice of a claim against the City.[2] (Claim Form, ***Exhibit 7***).[3] Contained within that written instrument are the following specific requests, which mirror the information required under MCL 691.1404(1):

1. Exact location of occurrence of accident;
2. Exact location and nature of defect upon street or sidewalk (with space to draw a diagram);
3. Detail of injuries suffered;
4. Identification and itemization of all known witnesses. [*Id.*].

Further, consistent with the information previously supplied to Ms. Rashid and consistent with where Mr. Wigfall's notice was sent, page two of the Corporation Counsel's notice form identifies Law Department's claims section as the proper address at which to forward completed, notarized forms:

[2] http://www.detroitmi.gov/How-Do-I/File/Law-Claims-Information

[3] The URL for the notice form indicates an update date of either 12/23/2015 or 12/23/2014 (http://www.detroitmi.gov/Portals/0/docs/Law/LawDepartmentClaimForm.pdf?ver=2015-12-23-140122-220)



Claim Form
(Notice of Claim Must Be Filed Not Later Than 45 Days from the Date of Accident)

City of Detroit Law Department
Claims Section
2 Woodward, Suite 500
Detroit, MI 48226

_____
(Today's Date)

_____
(Print Name)

Gentlemen:

Claim is hereby made against the City of Detroit due to the following happening on

_____ at _____AM, PM
(Month – Day – Year) (Time)

Id. at p. 2.[4]

As set forth above, Mr. Wigfall's notice was received by the City's Law Department on September 22, 2014. (9/8/15 Correspondence at p. 1, ***Exhibit 3***). Thereafter, on December 7, 2014, he received acknowledgement from the Law Department that the claim had been filed, along with a request for additional information to process the claim. (12/3/14 Correspondence, ***Exhibit 8***). Mr. Wigfall then provided the requested information to the City via its Law Department on January 28, 2015. (1/28/15 Correspondence, ***Exhibit 9***).

PROCEDURAL HISTORY

Mr. Wigfall filed his Complaint on December 2, 2015, commencing this action against the City pursuant to MCL 691.1402(1), which provides that a governmental agency with jurisdiction over a highway may be held liable for failing to "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." As its first responsive pleading, the City filed a Motion for Summary Disposition arguing that he did not properly serve notice of the occurrence of the injury and highway defect in accordance with MCL 691.1404.

[4] In fact, while the form enclosure letter for the City's Claim Form references vehicle damage and property damage, the Claim Form itself has no limitations. It references and seeks information regarding "injuries and damages suffered (*Id.* at 3) and the "amount of claim", including "doctor and hospital bills on personal injury claims" (*Id.* at 4).

Specifically, it asserted that Mr. Wigfall improperly mailed notice to the "City of Detroit Law Department—CLAIMS", instead of the mayor, city clerk, or city attorney (i.e., in this case the City's corporation counsel), in contravention of MCL 691.1404(2). Mr. Wigfall opposed the Motion, arguing that he properly served his notice in conformance with Michigan law, particularly given the facts of this case, and also that the City was equitably estopped from asserting improper service.

The trial court conducted oral arguments regarding the City's Motion on April 15, 2015, and it took the matter under advisement. (4/15/16 Hearing Tr. at p. 11, ***Exhibit 10***). Ultimately, the trial court denied the City's Motion, finding that service was properly made, as well as that it was barred by equitable estoppel from contesting service. Specifically, it wrote in an Order, dated June 8, 2016:

* * *

> Arguing this issue is analogous to that addressed in *Withers v City of Detroit*, unpublished per curiam opinion of the Court of Appeals, issued February 18, 2016 (Docket No. 324009), Defendant asserts Plaintiff's notice was deficient ant that dismissal is thus required.
>
> This Court disagrees.
>
> First, *Withers* is an unpublished decision from the Court of Appeals, and thus it is not binding on this Court. Further, the letter sent by the plaintiff in *Withers* was by ordinary mail; here Plaintiff's notice was properly sent and received via certified mail. Moreover, here the City responded by way of its own letter dated December 3, 2014, stating: "The filing of your client's claim regarding the above-referenced incident is hereby acknowledged." Accordingly, this Court finds these circumstances readily distinguishable, and that here there was substantial compliance with §4(2), unlike the Court of Appeals' holding in *Withers*.
>
> Alternatively, this Court also finds Defendant is equitably estopped from asserting this defense under these particular circumstances.

* * *

> Here, the information regarding claims on the City's website, and more so the affidavit submitted by Plaintiff from Julie Rashid regarding instructions which she avers she received from a 'Ms. Tyler', support estoppel. Tellingly, Defendant's reply brief states:
>
> > No facts are offered that a representation was made by Ms. Tyler (*who no longer is employed by the City or its claims section*), that service of a claim on the claims section would substitute for service by state law.
>
> Defendant's 3/15/16 reply brief, at unnumbered p 6 (emphasis added). Accordingly, Defendant concedes that 'Ms. Tyler" was a former employee in its claims section. Ms. Rashid's affidavit avers that she telephoned the City of Detroit Law Department on October 28, 2013 to inquire as to the "proper contact and address to serve notice of a claim for injuries," and was instructed by Ms. Tyler to use the contact an address which was then used in this case. [6/8/16 Order at pp. 4-5, ***Exhibit 1*** (emphasis in original)].

On review, the Court of Appeals (Saad, P.J., and Cavanagh and Cameron, JJ.) disagreed and reversed the trial court, remanding case to the trial court for entry of an order granting the City's Motion. (Slip op. at p. 1, ***Exhibit 11***). Notwithstanding the specific direction on the City's Claim Form (consistent with what was told to Mr. Wigfall's counsel, see J.Rashid Affidavit at ¶¶ 3-4, ***Exhibit 4***), the Court determined "[b]ecause it is undisputed that plaintiff did not serve his notice upon any individual who may lawfully be served with civil process directed against defendant as required under MCL 691.1404(2), plaintiff failed to comply with the statutory notice requirement." (Slip op. at p. 3, ***Exhibit 11*** (citation omitted)). It further concluded:

> In this case, the trial court concluded that equitable estoppel applied and prevented defendant from asserting that notice was insufficient because defendant provided information on its website and over the telephone regarding the provision of notice related to claims. But this holding essentially charges defendant with the duty to provide potential litigants with legal advice related to the interpretation of a statute and court rule. And because in this case

> plaintiff received incorrect, inapplicable, or misinterpreted legal advice, defendant should be estopped from asserting that the statutory notice requirement was not met. We cannot agree.
>
> …Plaintiff did not serve notice upon "the mayor, the city clerk, or the city attorney," allegedly because of the misinformation provided by defendant. The equitable estoppel doctrine does not excuse that failure to comply with the statutory mandate and the trial court's decision to the contrary was erroneous. Accordingly, defendant's motion for summary disposition should have been granted because plaintiff's action was barred by governmental immunity. [*Id.* at 4].

STANDARD OF REVIEW

The standard of review applicable to this matter is de novo since it involves review of a trial court's determination of whether summary disposition is proper. *Borman v State Farm Fire and Casualty Company*, 198 Mich App 675, 678; 499 NW2d 419, aff'd 446 Mich 482; 521 NW2d 266 (1994). *See also, Devine v Al's Lounge, Inc*, 181 Mich App 117, 118-119; 448 NW2d 725 (1989) ("[s]ummary disposition is appropriate only if the court is satisfied that it is impossible for the nonmoving party's claim to be supported at trial because of a deficiency that cannot be overcome"). Additionally, the proper interpretation of a statute is a question of law, which the Court reviews de novo. *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 529; 740 NW2d 503 (2007); *Farmers Ins Exch v AAA of Michigan*, 256 Mich App 691, 694; 671 NW2d 89 (2003).

LAW AND ARGUMENT

I. THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR VACATING THE TRIAL COURT'S DENIAL OF DEFENDANT-APPELLEE'S MOTION FOR SUMMARY DISPOSITION BECAUSE PLAINTIFF-APPELLANT'S NOTICE WAS LAWFULLY SERVED ON THE "CITY OF DETROIT—CLAIMS" AS DIRECTED BY DEFENDANT-APPELLEE'S CORPORATION COUNSEL.

A. General Law Regarding Statutory Interpretation

The rules of statutory construction require that courts give effect to the Legislature's intent. *Bush v Shabahang*, 484 Mich 156, 166; 772 NW2d 272 (2009); *Truel v City of Dearborn*, 291 Mich App 125, 131–132; 804 NW2d 744 (2010). Courts should first look to the specific statutory language to determine the intent of the Legislature, which is presumed to intend the meaning that the statute plainly expresses. *Institute in Basic Life Principles, Inc v Watersmeet Twp. (After Remand)*, 217 Mich App 7, 12; 551 NW2d 199 (1996). "If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted, and courts must apply the statute as written." *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997). If reasonable minds could differ regarding the meaning of a statute, judicial construction is appropriate. *Yaldo v North Pointe Ins Co*, 457 Mich 341, 346; 578 NW2d 274 (1998).

B. Mr. Wigfall Served the City Notice of Injury and Defect in Compliance with MCL 691.1404 Given the Facts and Law Applicable to this Case.

The Governmental Tort Liability Act ("GTLA"), MCL 691.1401 *et seq.*, provides immunity from tort claims to governmental agencies engaged in a governmental function, as well as governmental officers, agents or employees. The Legislature has set forth six exceptions to governmental tort immunity. *Lash v City of Traverse City*, 479 Mich 180, 195 n. 33; 735 NW2d

628 (2007). Relevant here is the "highway exception" to governmental immunity, which allows a governmental agency to be liable for damages caused by an unsafe highway. Specifically, MCL 691.1402(1) provides in relevant part:

> Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.

An injured person is required to timely notify the governmental agency having jurisdiction over the roadway of the occurrence of the injury, the injury sustained, the nature of the defect, and the names of known witnesses. MCL 691.1404(1); *Rowland v Washtenaw Co Rd Comm.*, 477 Mich 197, 200, 203–204, 219; 731 NW2d 41 (2007). Failure to provide adequate notice under this statute is fatal to a plaintiff's claim against a governmental agency. *Id.* at 219. MCL 691.1404 provides in relevant part:

> (1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.
>
> (2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding.

Notice need not be provided in any particular form and is sufficient if it is timely and contains the requisite information. *Burise v City of Pontiac*, 282 Mich App 646, 654; 766 NW2d 311 (2009). The required information does not have to be contained within the plaintiff's initial

notice; it is sufficient if a notice received by the governmental agency within the 120–day period contains the required elements. *Id.*

This Honorable Court has explained that MCL 691.1404 is "straightforward, clear, unambiguous" and "must be enforced as written." *Rowland*, 477 Mich at 219. Although under some circumstances the Court of Appeals has concluded that a notice is sufficient despite a technical defect, *see, e.g., Plunkett*, 286 Mich App at 176–177, a plaintiff must at least "adequately" provide the required information. *Id.* at 178. "'Some degree of ambiguity in an aspect of a particular notice may be remedied by the clarity of other aspects.'" *Id.* at 177, quoting *Jones v Ypsilanti*, 26 Mich App 574, 584; 182 NW2d 795 (1970), in turn quoting *Smith v City of Warren*, 11 Mich App 449, 455; 161 NW2d 412 (1968). Therefore, Michigan courts do not construe MCL 691.1404 in an overly restrictive manner, *Plunkett*, 286 Mich App at 176–177, so as to "make it difficult for the average citizen to draw a good notice." *Meredith v City of Melvindale*, 381 Mich 572, 579; 165 NW2d 7 (1969) (quotation marks and citation omitted).

While it has been held that MCL 691.1404 is "straightforward, clear, unambiguous" and "must be enforced as written." *Rowland*, 477 Mich at 200, the provision of law should be interpreted with reason and common sense so as not to make out of the provision a shelter and protection for municipalities. Notice can be sufficient where the plaintiff is deemed to have substantially complied with the Statute. *Plunkett*, 286 Mich App at 176-177; *see also Hussey v Muskegon Hts*, 36 Mich App 264, 267–268; 193 NW2d 421 (1971) (holding "a notice of injury and defect will not be regarded as insufficient because of a failure to comply literally with all the stated criteria. Substantial compliance will suffice."); *Jones v Ypsilanti*, 26 Mich App 574, 584, 182 NW2d 795 (1970) (all that is required to create a legally sufficient notice is that the plaintiff

substantially comply with the notice requirement); *Smith v City of Warren*, 11 Mich App 449; 161 NW2d 412 (1969).

The leading case on notice statutes, *Rowland, supra*, supports substantial compliance. The *Rowland* Court dealt with the question of whether, absent a showing of actual prejudice to the governmental agency, failure to comply with the notice provision is a bar to notice claims filed pursuant to the defective highway exception. *Id. at* 200. The Court overruled prior cases that held "absent a showing of actual prejudice to the governmental agency, failure to comply with the notice provision is not a bar to claims filed pursuant to the defective highway exception." *Id.* at 208-209. In its opinion, this Court examined the entire jurisprudence of Michigan notice statutes, finding that the legitimate purpose of notice provisions is to "rationally and reasonably provide the State with the opportunity to investigate and evaluate a claim." *Id.* at 211, quoting *Downriver Plaza Grp v Southgate*, 444 Mich 656, 666; 513 NW2d 807 (1994). The Court determined that, in order satisfy MCL 691.1404, "notice is adequate if it is served within 120 days and ***otherwise complies*** with the requirements of the statute, i.e., it specifies (1) the exact location of the defect; (2) the exact nature of the defect; (3) the injury sustained; and (4) any witnesses known at the time…" *Rowland,* 477 Mich at 219 (emphasis added).

More recently, in *McCahan v Brennan*, 492 Mich 730, 733; 822 NW2d 747 (2012), this Court reaffirmed "the core holding of *Rowland* that ... statutory notice requirements must be interpreted and enforced as plainly written and ... courts may not engraft an actual prejudice requirement or otherwise reduce the obligation to comply fully with statutory notice requirements." The plaintiff in *McCahan* failed to file *any* notice of his intent to pursue a claim within the statutory six months, therefore plaintiff's claim was barred by the plain language of the statute. *Id.* at 745. The Court reasoned, "provisions requiring notice to a particular entity

further ensure that notice will be provided to the ***proper*** governmental entity, thereby protecting plaintiffs and defendants alike from having the wrong component of government notified." *Id* at 744 (emphasis added).

The *McCahan* Court clarified that the purpose of notice statutes is to ensure notice is properly received and processed by the correct governmental entity:

> What we do here is not "strict enforcement" of the notice provision, but what any Court must do: give a *reasonable interpretation* to the language that the Legislature has passed and the Governor has signed into law. We find nothing "strict," as opposed to being merely reasonable, in concluding that "six months" means "six months." [*Id.* at 761 (emphasis in original)].

The Court left open the issue of what would "otherwise" or "substantially" comply with the remaining portions of the notice statute.

As noted, in order to "rationally and reasonably provide the State with the opportunity to investigate and evaluate a claim," the notice required by MCL 691.1404 "need not be in any particular form." *Thurman v City of Pontiac*, 295 Mich App 381, 385; 819 NW2d 90 (2012). The test of the sufficiency of a notice of claim regarding tort action against municipality is whether the public entity is able to locate the place, fix the time, and understand the nature of the accident. McKinney's General Municipal Law § 50–e; *Parker-Cherry v NYC Housing Auth.*, 878 NYS. 2d 790 (App. Div. 2d Dep't. 2009). In determining the sufficiency of notice of a claim, the whole notice and all facts stated therein may be considered (in light of the statutory language requiring the notice). *Rule v Bay City*, 12 Mich App 503, 507–508; 163 NW2d 254 (1968).

Here, the cases the City (and Court of Appeals) relied upon in support of strict compliance with the notice statute almost exclusively involve the timeliness of statutory notice. *See, e.g., Rowland, supra; McCahan, supra,* and *Green v Detroit,* 87 Mich App 313; 274 NW2d 51 (1978). In those cases, the plain meaning or 'reasonable interpretation' of 120 days was 120

days (or other time frame as the particular provision at issue indicated), and in applying the facts to the statutory time requirement, the Courts determined that claimants either provided notice within the time frame or they did not. Such decisions are supported by the "reasonable interpretation" of notice time requirements, and the fact that the purpose of these notice statutes is to "rationally and reasonably provide the State with the opportunity to investigate and evaluate a claim." *Rowland, supra.* Therefore, where the state is deprived of the ability to timely investigate and evaluate a claim, no judicial saving construction is available to the claimant. In this case, however, the notice Mr. Wigfall provided served the purpose of the notice Statute, the notice was timely and complete, and complied with the remaining relevant portions of the Statute that support that purpose.

Unlike timeliness requirements, service of notice is adequate if it "otherwise complies with the requirements of the statute." *Rowland,* 477 Mich at 219. In order to provide adequate notice, Mr. Wigfall must have at least provided notice that substantially complies with the requirements of MCL 631.1404, so the City may "rationally and reasonably [have] the opportunity to investigate and evaluate a claim." *Id.* at 211; *Plunkett,* 286 Mich App at 178.

Here, Mr. Wigfall complied with MCL 691.1404(2) and applicable court rules governing service of process, as well as provided service of notice in the manner specifically directed by the City's attorney. MCL 691.1404(2) provides, "[t]he notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding." The Michigan Court Rules delineate who may lawfully be served within a municipality, "[s]ervice of process on a municipality…may be made by serving a summons and a copy of the complaint on the mayor, the city clerk, or the

city attorney of a city." MCR 2.105(G)(2). As this matter involves service upon the City Attorney (i.e., Corporation Counsel), the court rules provide further guidance on how to lawfully provide service to an attorney's office. "Service of a copy of a paper on an attorney must be made by… mailing to the attorney at his…business address." MCR 2.107(C).

> (1) Delivery of a copy to an attorney within this rule means:
>
> > (a) handing it to the attorney personally, or, if agreed to by the parties, emailing it to the attorney as allowed under MCR 2.107(C)(4);
> >
> > (b) leaving it at the attorney's office with the person in charge or, if no one is in charge or present, by leaving it in a conspicuous place; or
> >
> > (c) if the office is closed or the attorney has no office, by leaving it at the attorney's usual residence with some person of suitable age and discretion residing there.

Mr. Wigfall's notice complied with all applicable requirements under MCL 691.1404(1) and (2). It was received by the Corporation Counsel, as directed to the City's Law Department (Corporation Counsel's own office), within 120 days via certified mail, return receipt requested. (9/8/14 Correspondence, ***Exhibit 3***; Detroit Code of Ordinances at Sec. 7.5-206, ***Exhibit 5***; Corporate Counsel Address, ***Exhibit 6***; Claim Form, ***Exhibit 7***). Further, through its representatives at the Law Department, the City actively communicated with Mr. Wigfall's counsel. The City, undeniably, had actual notice of Mr. Wigfall's claim. (12/3/14 Correspondence, ***Exhibit 8***; 1/28/15 Correspondence, ***Exhibit 9***). Moreover, because all of this information was provided and actually received by the City's Law Department, the City was given a reasonable opportunity to investigate and evaluate the claim. This is bolstered by the fact that City requests that notices of claims be sent to the Corporation Counsel's Law Department, as

opposed to the mayor or city clerk, meaning investigation and evaluation of claims takes place within the Law Department. (Claim Form, ***Exhibit 7***).

The Court of Appeals and the City incorrectly posit that the result in this case must mirror the outcome of *McLean v Dearborn*, 302 Mich App 68; 836 NW2d 916 (2013). (See, Slip op. at p. 3, ***Exhibit 11***). While the cases are similar in that the plaintiff in *McLean* directed the initial notice to a department within the City of Dearborn (i.e., "City Manager or Mayor's Office"), they differ in that *McLean's* notice failed to specify the plaintiff's injury, rendering it defective. In correcting their deficiency, the *McLean* plaintiff's second notice was sent to the City of Dearborn's third-party administrator, Broadspire. Finding the notice to be deficient, the Court of Appeals recognized:

> There is simply no record evidence in this case indicating that Broadspire was authorized by *written appointment* or *law* to accept service on behalf of defendant. MCR 2.105(H)(1). Plaintiff's claim appears to rest on the theory of apparent authority. *Central Wholesale Co. v. Sefa*, 351 Mich. 17, 25, 87 N.W.2d 94 (1957), quoting 2 CJS, Agency, § 96(b), pp. 1210–1211 (" 'Whenever the principal, by statements or conduct, places the agent in a position where he appears with reasonable certainty to be acting for the principal ... an apparent authority results which replaces that actually conferred as the basis for determining rights and liabilities.' ") However, the claim must fail in light of the clear language of the relevant court rule and MCL 691.1404(2). In the absence of any evidence of a written appointment of Broadspire as defendant's agent (for purposes of receiving service of process), or any law granting Broadspire such authority, plaintiff's letter to Broadspire simply did not function as a supplemental notice under the statute. [*Id.* at 80-81].

Here, Mr. Wigfall has not sent defective notice, as demonstrated above; he fully complied with the requirements of MCL 691.1404(1), as articulated by this Court in *Rowland.* *McLean's* holding speaks to waiver of service when correcting deficiencies in initial notices, not whether service upon the "City Manager or Mayor's office" was sufficient standing alone. The notice

provided here served the purpose of the notice statute, and timely complied with the relevant portions of the statute that support that purpose. Moreover, unlike in *McLean,* there is direct evidence here of a written appointment for the City's Law Department to serve as its Corporation Counsel's agent—if that is even needed given the fact that they share an office. (Detroit Code of Ordinances at Sec. 7.5-206, ***Exhibit 5***; Corporate Counsel Address, ***Exhibit 6***; Claim Form, ***Exhibit 7***). This fact, alone, distinguishes *Withers v Detroit*, No. 324009, 2016 WL 683125 (Mich Ct App Feb 28, 2016) (***Exhibit 12***) on which the City relied, particularly for its argument in the trial court. Indeed, there is no discussion in *Withers* whatsoever about the Claim Form—a written instrument for which the Corporation Counsel has responsibility for drafting and approving—which directs that it be returned to the City's Law Department, as Mr. Wigfall did in this case.

As this Court has reiterated in its holdings on notice statutes, service rules—such as these quoted above—exist to "rationally and reasonably provide the State with the opportunity to investigate and evaluate a claim." *Rowland,* 477 Mich at 211. Here, Mr. Wigfall served notice in conformity with MCR 2.105(G)(2) and 2.107(C), and in conformity with the published instructions of the City's Corporation Counsel/City Attorney, directing service to Corporation Counsel's Law Department, i.e. The City Attorney's Office pursuant to MCR 2.107(C)(1)(b). Mr. Wigfall's attorneys even made phone calls to the Law Department to ensure they had the most effective means of providing service to the Corporation Counsel. (J.Rashid Affidavit, ***Exhibit 4***). In the end, service was complete and effective, and the City has been given the opportunity to investigate and evaluate his claim as originally intended by the Legislature. The trial court properly denied the City's Motion for Summary Disposition, and that determination should be reinstated. The Court of Appeals committed reversible error vacating it.

Significantly, however, even if this Honorable Court questions the trial court's determination, summary disposition is still inappropriate at this stage. No discovery has occurred in this case at all and Mr. Wigfall, minimally, is entitled to explore creation of the City's Claim Form (***Exhibit 7***), the purposes for which it was drafted (i.e., **as a basis for written appointment of another to receive service**), and why there would be any distinction between returning that document, which requests the exact information required by MCL 691.1404(1), to the City's Law Department and providing notice pursuant to MCL 691.1404(2) elsewhere. "[S]ummary disposition is premature if granted before discovery on a disputed issue is complete," *State Treasurer v Sheko,* 218 Mich App 185, 190; 553 NW2d 654 (1996). Consequently, summary disposition on this issue, minimally, is premature; however, as discussed herein, the facts of this case do not warrant dispositive relief in the City's favor.

II. THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR VACATING THE TRIAL COURT'S DENIAL OF DEFENDANT-APPELLEE'S MOTION FOR SUMMARY DISPOSITION BECAUSE DEFENDANT-APPELLEE SHOULD BE EQUITABLY ESTOPPED FROM ASSERTING IMPROPER SERVICE GIVEN ITS EXPRESS REPRESENTATIONS IN THIS CASE.

Equitable estoppel has been defined as the effect of the voluntary conduct of a party whereby he is precluded from asserting rights against another who has justifiably relied on such conduct and changed his position so that he will suffer injury if the former is allowed to repudiate the conduct. 10 Am. Jur. Proof of Facts 2d 221. It arises where "(1) a party by representation, admissions, or silence intentionally or negligently incudes another party to believe facts, (2) the other party justifiably relies and acts on this belief, and (3) the other party will be prejudiced if the first party is permitted to deny the existence of the facts." *Hughes v Almena Twp,* 284 Mich App 50, 78; 771 NW2d 453 (2009). *See also Pittsfield Twp v Malcolm,* 375 Mich 135, 147-148; 134 NW2d 166 (1965) (estoppel against a municipality may be

appropriate where a party changes its position in reliance on a mistake committed by the municipality). Equitable estoppel is generally a question of fact, but where facts are not contested, equitable estoppel should be granted as a matter of law. 10 Am. Jur. Proof of Facts 2d 221.

The issue here is whether, due to conduct and statements of the City's representatives, including Corporation Counsel, Mr. Wigfall reasonably believed the City was adequately notified of his claim, i.e., whether Defendant is equitably estopped from asserting the defense of lack of notice in compliance with MCL 691.1404(2). In other words, were the circumstances of this matter such as to lead Mr. Wigfall to believe that the City would not assert a lack of proper service of notice in defense of the claim. *Green*, 87 Mich App at 319.

Each of the elements for estoppel is met here. The City's Corporation Counsel/City Attorney, as the City's agent, placed a document on their government website instructing the public on how to file service of notice of claims. (Claim Form, ***Exhibit*** 7). The notice instructions were printed on Corporate Counsel's letterhead, and contained requests for all of the statutorily required information, including time limitations, exact location of injury and defect, witness information, and a notarized signature to ensure authenticity. *Id.*

Further, Mr. Wigfall's attorney's placed a phone call to confirm the proper contact information for service of notice, and the City's agent, Ms. Tyler, provided the same address that was listed in the notice instructions document posted on its website. (J.Rashid Affidavit, ***Exhibit 4***). Based on the notice instructions document and the phone conversation, the City did in fact cause Mr. Wigfall to believe "Law Department-Claims" was the appropriate location for service of notice. Mr. Wigfall did in fact rely on this information, as he served notice to "Law

Department-Claims", in compliance with MCL 691.1404, the city's notice instructions document, and its verbal instructions. (J.Rashid Affidavit, ***Exhibit 4***; Claim Form, ***Exhibit 7***).

There remains the question of whether "[Mr. Wigfall] is prejudiced if [the City] is allowed to deny the existence of these facts." *Hughes*, 284 Mich App 78. The answer, clearly, is yes; the time has passed to allow Mr. Wigfall to remedy his notice. If the City is allowed to assert improper service of notice, after instructing Mr. Wigfall and the public at large on where to send notice, Mr. Wigfall's negligence claim is lost and he has no available remedy to recover for his losses. This Court should not permit the City to frustrate Mr. Wigfall's ability to comply with the Statute, when the statute only exists for the City's benefit, and now assert noncompliance as a defense. The trial court properly determined that equitable estopped applied in this case to bar the City's service argument, and that determination should be affirmed as well. The Court of Appeals erred when it failed to do so. On either basis, however (validity of service or estoppel), summary disposition is inappropriate given the facts of this case.

RELIEF REQUESTED

Therefore, based upon the foregoing argument and analysis, Plaintiff-Appellant, Dwayne Wigfall, respectfully requests that this Honorable Court schedule argument on his Application for Leave to Appeal pursuant to MCR 7.305(H)(1) and/or grant the Application, permitting this matter to continue as a calendar case, as well as award him all other relief to which he is entitled.

Respectfully submitted,

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Co-Counsel for Plaintiff-Appellant

By: _/s/*Stacey L. Heinonen*_____

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Dated: November 21, 2017

CERTIFICATE OF SERVICE

Stacey L. Heinonen, being duly sworn, deposes and says that she is employed by the Mike Morse Law Firm, attorneys for Plaintiff-Appellant, and that on November 21, 2017, she served a copy of the foregoing Plaintiff-Appellant, Dwayne Wigfall's, Application for Leave to Appeal upon all counsel of record, via the Court's True Filing system.

BY: /s/*Stacey L. Heinonen*